



TEXAS ETHICS COMMISSION



****Overruled, Modified, Clarified, or Superseded****

ETHICS ADVISORY OPINION NO. 16

June 4, 1992

Whether certain activities relating to the filing of a trademark application would be considered lobbying. (AOR-14)

The Texas Ethics Commission has been asked to consider whether a law firm's activities in regard to the filing of a trademark application with the Secretary of State's Office would be within the scope of chapter 305 of the Government Code, which regulates lobby activity. The requestor first notes that no individual lawyer, paralegal, or secretary associated with the firm spends more than five percent of his or her time on work involving state trademark applications. The commission has adopted the following rule in this regard:

For purposes of [the compensation threshold of the lobby statute and commission rules] a person is not required to register if direct communication to influence legislation or administrative action constitutes only an incidental portion of the activities and duties for which the person receives compensation.

Tex. Ethics Comm'n, 17 Tex. Reg. 358 (1992) (emergency rule to be codified at title 1, section 10.3(c), of the Texas Administrative Code).¹ The commission has also adopted a rule stating that "direct communication" constitutes an "incidental" portion of one's activities and duties if "no more than 5.0% of one's compensated time during a calendar quarter constitutes time spent in direct communication and in preparing for such communication." *Id.* (rule 10.3(d)). It is important to bear in mind, however, that a calculation under this provision would have to include any compensated time for any type of lobby activity by an individual, not just lobby activity in regard to a particular type of issue.

The requestor also refers to the work of clerical staff. In this regard we note that the commission has adopted a rule excepting from the registration and reporting requirements of the lobby statute the provision of "merely clerical assistance in producing direct communication to influence legislation or administrative action, such as typing or hand-delivering a letter or other document." *Id.* (rule 10.7(a)(3)).

In regard to the filing of a trademark application, the requestor states that the secretary of state sometimes rejects an application on the basis that the trademark is "confusingly similar" to an already registered trademark.² A lawyer may want to discuss with an employee of the Secretary of State's Office the specific basis for the rejection. As indicated above, this commission has adopted rules excepting certain types of communication from the registration and reporting requirements of the lobby statute. *Id.* (rule 10.7). One excepted activity is "direct communications for the purpose of compliance with existing laws, administrative rules, policies, and procedures, when there is no attempt to change or seek exceptions to such rules, policies, or procedures." *Id.* (rule 10.7(a)(8)). This exception would apply to discussions or negotiations intended to persuade a member of the executive branch that an applicant does in fact meet agency standards of general applicability. *See generally Ethics Advisory Opinions Nos. 15, 14* (1992). The secretary of state is directed by statute to reject an application for registration of a trademark that is likely to cause confusion with an already registered trademark. Bus & Com. Code § 16.08(a)(6). A discussion about whether a proposed trademark is in fact confusingly similar to an existing trademark would not be an attempt to change or seek exceptions to a rule.³ Rather, it would be a

discussion about whether an applicant did in fact meet a statutory standard. Such a discussion would not, by itself, be activity covered by the lobby statute.

SUMMARY

A person is not required to register under chapter 305 of the Government Code if direct communication and preparation to influence administrative action constitute no more than five percent of the person's compensated time during a calendar quarter. The registration and reporting requirements of chapter 305 do not apply to the provision of "merely clerical assistance in producing direct communication" to influence administrative action. The registration and reporting requirements of chapter 305 do not apply to a discussion between a lawyer and a member of the executive branch about whether a proposed trademark was in fact confusingly similar to an already existing trademark.

¹ The rules of the Ethics Commission that were proposed for codification at chapter 10 of title 1 of the Texas Administrative Code actually should have been proposed for codification at chapter 40 of that title. For purposes of this opinion, we have cited to the rules as published.

² A mark is not registrable if it "is likely to cause confusion or mistake, or to deceive, because when applied to the applicant's goods or services, it resembles another person's unabandoned mark registered in this state." Bus. & Com. Code § 16.08(a)(6).

³ The registration and reporting requirements of the lobby statute would apply to any expenditures , as described in section 305.006(b), for the benefit of members of the executive branch made in connection with such activity.